

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-11896
Non-Argument Calendar

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT FEBRUARY 21, 2006 THOMAS K. KAHN CLERK
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D. C. Docket No. 04-00562-CR-T-30-MAP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERMAN DE ARMAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(February 21, 2006)

Before DUBINA, HULL and MARCUS, Circuit Judges.

PER CURIAM:

German De Armas appeals his 135-month sentence and convictions for possession with intent to distribute 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of 46 U.S.C. App. § 1903(a), (g), and 21 U.S.C. § 960(b)(1)(B)(ii) (Count 1), and conspiracy to possess with intent to distribute 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine while on board a vessel subject to the jurisdiction of the United States, in violation of § 1903, (a), (g), (j), and § 960(b)(1)(B)(ii) (Count 2). The 135-month sentence De Armas received was the lowest possible term within the applicable 135 to 168 months' advisory Guidelines range.

On appeal, De Armas argues that: (1) his sentence was unreasonable in light of the 18 U.S.C. § 3553(a) factors and the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005);¹ and (2) the district court's imposition of sentence and retroactive application of Booker violated ex post facto and due process principles.² After careful review, we affirm.

¹We have already rejected the government's argument that we do not have jurisdiction to review the reasonableness of a sentence within the advisory Guidelines range. See United States v. Martinez, --- F.3d ---, 2006 WL 39541 *3 (11th Cir. Jan. 9, 2006) (rejecting government's argument that this Court lacks jurisdiction to review sentences for reasonableness under 18 U.S.C. § 3742); see also United States v. Mickelson, --- F.3d ---, 2006 WL 27687 *2 (8th Cir. Jan. 6, 2006) (same).

² As for De Armas's argument, raised for the first time on appeal, that the district court lacked subject-matter jurisdiction over the instant case because the Maritime Drug Law Enforcement

We “review for unreasonableness” a sentence imposed post-Booker. Booker, 543 U.S. at ___, 125 S.Ct. at 765 (quotation and alteration omitted); see also United States v. Crawford, 407 F.3d 1174, 1178 (11th Cir. 2005) (noting that “Booker established a ‘reasonableness’ standard for the sentence finally imposed on a defendant”). In making our reasonableness review, we consider the final sentence, in its entirety, in light of the § 3553(a) factors. See United States v. Winningear, 422 F.3d 1241, 1245 (11th Cir. 2005) (“We do not apply the reasonableness standard to each individual decision made during the sentencing process; rather, we review the final sentence for reasonableness.”). We review de

Act (“MDLEA”) represented an ultra vires exercise of Congressional power under the Piracies and Felonies Clause of the Constitution, we discern no plain error. Cf. United States v. Williams, 121 F.3d 615, 618 (11th Cir. 1997) (reviewing challenge to constitutionality of statute, based on assertion that Congress exceeded its authority in enacting statute, for plain error). Because there was no precedent on point from the Supreme Court or this Court, any alleged error could not be plain. See United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000) (holding that “an error cannot meet the ‘plain’ requirement of the plain error rule unless it is ‘clear under current law.’ . . . [W]hen neither the Supreme Court nor this Court has ever resolved the issue, and other circuits are split on it, there can be no plain error in regard to the issue.” (citations omitted)); see also United States v. Moreno-Morillo, 334 F.3d 819, 824 (9th Cir. 2003) (holding that Congress acted within constitutionally conferred authority in enacting MDLEA). Moreover, we have noted that “this circuit and other circuits have not embellished the MDLEA with [the requirement of] a nexus [between a defendant’s criminal conduct and the United States].” United States v. Rendon, 354 F.3d 1320, 1325 (11th Cir. 2003), cert. denied, 541 U.S. 1035 (2004). Simply put, the district court did not commit plain error by failing to hold sua sponte that the MDLEA was unconstitutional because Congress had exceeded its authority under the Piracies and Felonies Clause.

We also must reject DeArmas’s argument that the MDLEA is unconstitutional in light of United States v. Gaudin, 515 U.S. 506 (1995). As De Armas recognizes, we expressly addressed and rejected his position in United States v. Tinoco, 304 F.3d 1088 (11th Cir. 2002). Because “only the Supreme Court or this Court sitting en banc can judicially overrule a prior panel decision,” we must follow Tinoco. See United States v. Marte, 356 F.3d 1336, 1344 (11th Cir. 2004) (discussing prior-precedent rule).

novo a defendant's claim that his sentence violated ex post facto principles. See United States v. Abraham, 386 F.3d 1033, 1037 (11th Cir. 2004), cert denied, 126 S. Ct. 417 (2005).

First, De Armas argues that his sentence was unreasonable in light of the § 3553(a) factors and the Supreme Court's decision in Booker.³ As for his claim that the district court did not adequately consider all of the § 3553(a) factors, we recently held that "nothing in Booker or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors." United States v. Scott, 426 F.3d 1324, 1329 (11th Cir. 2005). Accordingly, a district court's failure to express reference each and every one of the § 3553(a) factors does not constitute error under Booker.

In any event, here, at the sentencing hearing, the district court expressly stated that it had considered all of the factors in § 3553(a). Although the district

³ In support of this claim, De Armas highlights the presence of the following factors as supporting a sentence below the advisory Guidelines range: (1) he has no criminal history; (2) the sentence that he suggested, 108 months' imprisonment, adequately would have reflected the seriousness of the offense and provided both specific and general deterrence; (3) he played a small role in a large conspiracy; (4) he received a significantly higher sentence than his codefendants based solely on the fact that he was the captain of the vessel; and (5) his base offense level was the same base offense level as that of a "'kingpin' of a large-scale organization," even though he had no equity or ownership interest in the drugs, was not earning a commission off of the sale of the drugs, and did not have a leadership position in the larger drug organization

court did not detail the weight that it had accorded to each individual sentencing factor, it was not required to do so. See Scott, 426 F.3d at 1329. On this record, we are satisfied with the district court's express statements that it had considered De Armas's codefendants' sentences, see § 3553(a)(6), as well as the facts that De Armas had no equity interest in the drugs, no role in the distribution of the drugs, and no role in the planning of the conspiracy. All of these facts were raised before the district court and plainly the court considered them. Simply put, De Armas's sentence was not unreasonable and is fully supported by the district court's sentencing considerations and factual findings. We can find no Booker error in the district court's consideration of the § 3553(a) factors here.

We likewise are unpersuaded by De Armas's argument that the district court violated ex post facto and due process principles when it sentenced him to 135 months' imprisonment because the maximum sentence that the district court could have imposed based solely on the facts charged in the indictment was 87 months' imprisonment.⁴ De Armas recognizes that we rejected a similar argument in

⁴To the extent De Armas suggests that the district court violated his Sixth Amendment rights by enhancing his sentence based on facts that were not alleged in his indictment or admitted by him, the district court did not err by finding facts supporting extra-verdict enhancements since it sentenced De Armas under an advisory guidelines scheme. See United States v. Chau, 426 F.3d 1318, 1323-24 (11th Cir. 2005) (rejecting a defendant's argument that, under an advisory guidelines scheme, the Sixth Amendment prohibits a sentencing court from finding facts supporting extra-verdict enhancements).

United States v. Duncan, 400 F.3d 1297 (11th Cir.), cert. denied, 126 S. Ct. 432 (2005). In that case, the defendant argued that retroactively applying the remedial holding of the Booker decision -- which allows for sentence enhancements based upon judicial fact-finding so long as the guidelines are applied in an advisory manner -- did not give him “fair warning” of the potential sentence, and thus, acted as an ex post facto law, in violation of his due process rights. Duncan, 400 F.3d at 1307.

In Duncan, like here, the essence of the defendant’s argument sought retroactive application of Booker’s Sixth Amendment holding, but not its remedial holding. Id. at 1306. We concluded Duncan had “sufficient warning” that life imprisonment was a potential consequence to his actions to satisfy due process and ex post facto concerns because, at the time of the offense, (1) the applicable statute provided for a sentence of life imprisonment; (2) the Guidelines provided that a judge would engage in fact-finding to determine sentence and could impose a sentence of life imprisonment; and (3) although mandatory Guidelines were in place, the law of this Circuit then recognized the United States Code as the source of the maximum sentence, which, in Duncan’s case, was a life sentence. Id. at 1307-08.⁵ De Armas recognizes that our holding in Duncan is dispositive here and

⁵The “fair warning” factors of Duncan also are present here. When De Armas committed the drug offenses, (1) the maximum term of imprisonment for De Armas’ offenses was life

suggests that Duncan was wrongly decided. According to our well-established prior-precedent rule, “[o]nly the Supreme Court or this Court sitting en banc can judicially override a prior panel decision.” United States v. Wright, 392 F.3d 1269, 1280 (11th Cir. 2004) (internal quotations and citations omitted), cert. denied, 125 S.Ct. 1751 (2005). Thus, pursuant to Duncan, we find no ex post facto or due process violation based on application of the Booker decision.

AFFIRMED.

imprisonment, see 21 U.S.C. § 960(b)(1)(B)(ii); (2) the Guidelines informed De Armas that a judge would engage in fact-finding to determine his sentence and could impose a sentence of up to life imprisonment, see 18 U.S.C. § 3551, et seq. (providing that the sentencing court could consider specified factors, including the guidelines, in imposing sentence); and (3) the relevant maximum at the time when De Armas committed his offense was the statutory maximum enacted in the United States Code, not the maximum established pursuant to the guidelines. See Duncan, 400 F.3d at 1308.